Date: July 14, 1997

Case No.: 95-INA-637

In the Matter of:

GILA LIFSHITZ,
Employer

On Behalf Of:

JANINA SEGELBACH,
Alien

Appearance: Paul W. Janaszek, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On June 22, 1994, Gila Lifshitz ("Employer") filed an application for labor certification to enable Janina Segelbach ("Alien") to fill the position of Cook Kosher (AF 4-5). The job duties for the position are:

> Prepare, season and cook soups, meats, vegetables according to the Kosher dietary requirements. Bake, broil, and steam meat, fish and other food. Prepare Kosher meats, such as Kreplach, Stuffed Cabbage, Matzo Balls, Decorate dishes according to the nature of celebration. Purchase foodstuff and accounts for the expenses incurred.

The requirements for the position are four years of high school and two years of experience in the job offered.

The CO issued a Notice of Findings on April 5, 1995 (AF 36-39). The CO proposed to deny labor certification on two grounds. First, the CO found that it does not appear that the job offer meets the definition of "employment" as stated in the regulations at 20 C.F.R. § 656.50 (recodified as § 656.3). The CO directed the Employer to provide evidence which clearly establishes that the position, as performed in her household, constitutes full-time employment. Second, the CO found that the Employer rejected one applicant for other than lawful, job-related reasons in violation of § 656.21(b)(6) (recodified as § 656.21(b)(5)).

Accordingly, the Employer was notified that it had until May 10, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated May 2, 1995 (AF 40-45), the Employer asserted that the cook will be expected to cook all meals for herself, her husband, their four children, and her grandmother. She stated that her mother previously performed the cooking duties; however, she is unable to continue doing so as she intends to resume her professional career. The Employer provided a typical schedule that the Cook will be required to follow, including estimated time allotments. In summary, the Cook will be required to prepare 15 breakfasts, 55 snacks, 25 lunches, 21 afternoon meals and 40 dinners weekly. Finally, the Employer stated that the Cook will not be required to perform any non-cooking related duties, as these are performed by family members.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The CO issued the Final Determination on May 31, 1995 (AF 48-49), denying certification because the Employer failed to address an issue raised in the NOF. Specifically, the Employer did not explain the lawful, job-related reasons for rejecting one applicant.

On June 7, 1995, the Employer requested review of the Denial of Labor Certification (AF 57-61). On August 25, 1995, the CO forwarded the file to the Board of Alien Labor Certification Appeals ("BALCA" or "Board"). Counsel for the Employer submitted a Brief in Support of Appeal on September 21, 1995.

Discussion

Section 656.20(c)(8) provides that the job opportunity must have been open to any qualified U.S. worker. As such, employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Further, § 656.21(b)(5) provides that an employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. Therefore, actions by the employer which indicate a lack of a good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work as required by § 656.1.

In this case, the CO questioned the Employer's recruitment efforts with regard to one applicant, Mr. Ocles (AF 36). In her recruitment report, the Employer stated that she contacted Mr. Ocles by telephone on September 5, 1994 (AF 26). The Employer further stated that the applicant did not have any knowledge of Kosher cuisine or experience in the job offered. Therefore, he was rejected for the job opportunity. However, in response to a questionnaire sent by the New York State Department of Labor, Mr. Ocles stated that the Employer never contacted him (AF 34). He further stated that he has approximately three years of experience as a Kosher Cook. In light of these inconsistencies, the CO, in the NOF, requested that the Employer further document her lawful, job-related reasons for rejecting the applicant (AF 36).

In rebuttal, the Employer failed to address this issue (AF 40-47). However, in the Request for Review, the Employer stated that this was an oversight (AF 57). The Employer went on to reiterate the assertions put forth in the recruitment report. In addition, the Employer submitted what she alleged to be her contemporaneous notes from her telephone interview with the applicant (AF 54).

Initially, we note that evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 90-INA-480 (Jan. 7, 1992); *Kelper International Corp.*, 90-INA-191 (May 10, 1991). Furthermore, an employer cannot supplement the record on appeal. *ST Systems, Inc.*, 92-INA-279 (Sept. 2, 1993); *Ira S. Roberta Silver*, 91-INA-180 (July 22, 1993). However, in *Madeleine S. Bloom*, 88-INA-152 (Oct. 13, 1989) (*en banc), recon. den.* (Dec. 20, 1989) (*per curiam)*, the Board held that the failure to file a timely

rebuttal may be excused where the facts require extraordinary relief to avoid manifest injustice.[2] The Board further held in *Park Woodworking, Inc.*, 90-INA-93 (Jan. 29, 1992) (*en banc)*, that *Bloom* is to be construed strictly in order to assure clarity and consistency in the application of the rebuttal requirements of § 656.25. Specifically, the Board noted that, in the absence of an especially egregious factor, such as a deceptive, defaulting attorney, the deadline to file rebuttal evidence will not be tolled. In this case, the Employer has merely stated that part of her rebuttal evidence was filed in an untimely manner because of an "oversight" and a "clerical mistake." We find that this is not an especially egregious factor which would allow us to overlook the untimeliness of this rebuttal evidence.

The Employer further argued that, in accordance with *The Weck Corp. (d/b/a Gracious Homes)*, 90-INA-76 (March 26, 1990), it was inappropriate for the CO to reject the Employer's reconsideration request. In that case, the employer stated in its request for review that its failure to cure the sole basis for the denial on rebuttal was an oversight and where the record tended to support that contention, it was inappropriate for the CO to reject summarily the employer's request. However, that case can be distinguished from the facts presented in the present case as the employer in that case merely wanted to delete some job duties and thereby cure the sole basis for the CO's denial, which was a combination of duties. As noted above, the Employer in this case wishes to submit additional evidence into the record. Therefore, it was reasonable for the CO to deny the Employer's Request for Reconsideration.

Accordingly, we find that the CO's denial of labor certification on grounds that the Employer failed to document lawful, job-related reasons for rejection of Applicant Ocles must be AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

Judge Holmes, concurring:

I concur with the conclusion reached by the majority. However, particularly since the fact pattern here is similar to that of numerous other cases, I think it important to note that the requirement of two years experience in kosher cooking is unduly restrictive as should have been found by the CO. (See, *Teresita Tecson*, 94-INA-014 (May 30, 1995).)

[2] Although the *Bloom, supra,* case dealt with the untimely filing of the entire rebuttal, we find that the standard set forth in that case can be applied to the untimely filing of only part of the rebuttal evidence as well.

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.